

IP 04-0199-CR 1 T/F USA v Riley
Magistrate Kennard P. Foster

Signed on 07/27/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
RILEY, FRANK,)	CAUSE NO. IP04-0199-CR-01-T/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. IP 04-199-CR-01 (T/F)
)	
FRANK RILEY,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Order entered by the Honorable John Daniel Tinder, Judge, on July 25, 2005, designating this Magistrate Judge to conduct a hearing on the Petition for Summons or Warrant for Offender Under Supervision filed with the Court on July 20, 2005, and to submit to Judge Tinder proposed Findings of Facts and Recommendations for disposition under Title 18 U.S.C. §§3401(i) and 3583(e). All proceedings were held on July 27, 2005 in accordance with Rule 32.1 of the *Federal Rules of Criminal Procedure*. Mr. Riley appeared in person with his appointed counsel, Victoria Bailey, Office of Indiana Federal Community Defender. The government appeared by John Dowd, Assistant United States Attorney. U. S. Parole and Probation appeared by Keith Kesterson, U. S. Parole and Probation officer, who participated in the proceedings.

On July 27, 2005, the Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. That Victoria Bailey, Office of Indiana Federal Community Defender, was present and appointed by the Court to represent Mr. Riley in regard to the pending Petition for Revocation of Supervised Release.

2. A copy of the Petition for Revocation of Supervised Release was provided to Mr. Riley and his counsel. The Magistrate Judge summarized the specification of the alleged violations and, further, Mr. Riley and his counsel informed the Court that they had read and understood the specification of violations and waived further reading thereof.

3. Mr. Riley was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition.

4. That Mr. Riley would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. That Mr. Riley had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. That if the preliminary hearing resulted in a finding of probable cause that Mr. Riley had violated an alleged condition or conditions of his supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Tinder's designation entered on July 25, 2005.

7. Ms. Bailey stated that Frank Riley would stipulate there is a basis in fact to hold him on the specifications of violation of supervised release set forth in the Petition. Mr. Riley waived the preliminary examination, in writing, which was accepted by the Court.

8. Mr. Riley, by counsel, stipulated that he committed the specified violations set forth in the Petition for Warrant or Summons for an Offender Under Supervision, filed with the Court on July 20, 2005 as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	<p>“The defendant shall refrain from any excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.”</p> <p>On April 20, 2005, June 21, 2005, June 22, 2005, June 23, 2005 and June 27, 2005, the offender submitted urine samples which tested positive for cocaine.</p>
2	<p>“The defendant shall participate in a program approved by the Probation Department for substance abuse, which program may include testing to determine if the defendant has reverted to the use of drugs or alcohol.”</p> <p>On May 31, 2005, June 4, 2005, June 9, 2005, June 11, 2005, June 14, 2005, July 2, 2005, and July 9, 2005, the offender failed to report to the VOA for random urine screens as required. On June 27, 2005, he was referred to the VOA for individual counseling and was instructed to call on that date to establish an initial appointment. The defendant failed to comply with this instruction.</p>
3	<p>“The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.”</p> <p>On June 27, 2005, the offender was instructed to report for an office appointment on July 7, 2005. He failed to report as directed. Subsequent attempts to contact the defendant were unsuccessful. He failed to submit a monthly report for June 2005, which was due on July 5, 2005.</p>
4	<p>“The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.”</p> <p>On July 15, 2005, this officer went to the offender’s residence and spoke with Karen Blackwell. She advised the offender left on July</p>

12, 2005, and she has not seen him since. She does not know his current whereabouts. Subsequently, this officer went to the offender's place of employment, Intricate Masonry, and spoke with his supervisor, Tony Combs. He advised the offender "worked for a few days and then disappeared." He estimated it has been a week since has last reported for work.

7 "The defendant shall not leave the judicial district without the permission of the Court or probation officer."

As indicated above, the defendant was arrested in Allen County, Indiana, which is located in the Northern District of Indiana. He did not have permission to travel outside the judicial district.

The Court placed Mr. Riley under oath and directly inquired of Mr. Riley whether he admitted violations of the specifications of his supervised release set forth above. Mr. Riley stated that he admitted the above violations of his supervised release as set forth above. The Court now finds there is a basis in fact for his admissions and accepts same.

Counsel for the parties further stipulated to the following:

- 1) Mr. Riley has a relevant criminal history category of VI, U.S.S.G. §7B1.4(a).
- 2) The most serious grade of violation committed by Mr. Riley constitutes a Grade B violation, pursuant to U.S.S.G. §7B1.1(b).
- 3) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release, the range of imprisonment applicable to Mr. Riley is 21-27 months.
- 4) The parties agreed on the appropriate disposition of the case as follows:

The defendant be sentenced to a period of confinement of 22 months to the custody of the Attorney General. No supervised release is to follow.

It is recommended by the undersigned Magistrate Judge that Mr. Riley be designated by the Attorney General of the United States and the Bureau of Prisons to the Federal Correctional

Institution located in Milan, Michigan, due to the fact that defendant suffers from diabetes, and that Milan, Michigan is closer to his children's residence.

The Court having heard the evidence and/or arguments of Mr. Riley, his counsel and the government, now finds that Mr. Riley violated the specified conditions of supervised release as delineated above in the Petition to Revoke his supervised release.

Mr. Riley's supervised release is therefore **REVOKED** and he is sentenced to the custody of the Attorney General or his designee for a period of 22 months. The service of the sentence is to begin immediately. Upon release from confinement, Mr. Riley will not be subject to any further term of supervised release.

It is recommended by the Magistrate Judge that Mr. Riley be designated by the Attorney General of the United States and the Bureau of Prisons to the Federal Correctional Institution in Milan, Michigan.

The Magistrate Judge requests that Mr. Kesterson, U. S. Parole and Probation Officer, prepare for submission to the Honorable John Daniel Tinder, Judge, as soon as practicable, a supervised release revocation judgment, in accordance with these findings of facts, conclusions of law and recommendation.

Counsel for the parties and Mr. Riley stipulated in open court waiver of the following:

1. Notice of the filing of the Magistrate Judge's Report and Recommendation;
2. Objection to the Report and Recommendation of the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §636(b)(1)(B); Rule 72(b), *Federal Rules of Civil Procedure*, and S.D.Ind.L.R.72.1(d)(2), *Local Rules of the U.S. District Court for the Southern District of Indiana*.

Counsel for the parties and Mr. Riley entered the above stipulations and waivers after being notified by the undersigned Magistrate Judge that the District Court may refuse to accept the stipulations and waivers and conduct a revocation hearing pursuant to Title 18 U.S.C. §3561 *et seq.* and Rule 32.1 of the *Federal Rules of Criminal Procedure* and may reconsider the Magistrate Judge's Report and Recommendation, including making a *de novo* determination of any portion of the Report or specified proposed findings or recommendation upon which he may reconsider.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above recommendation revoking Mr. Riley's supervised release and the sentence imposed of imprisonment of 22 months in the custody of the Attorney General or his designee. Further, that upon Mr. Riley's release from confinement, he will not be subject to a term of supervised release. The Magistrate Judge also recommends that the defendant be designated to the Federal Correctional Institution in Milan, Michigan.

IT IS SO RECOMMENDED this 27th day of July, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

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